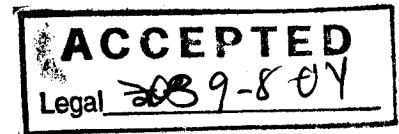
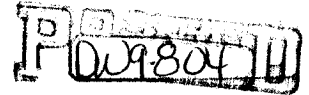


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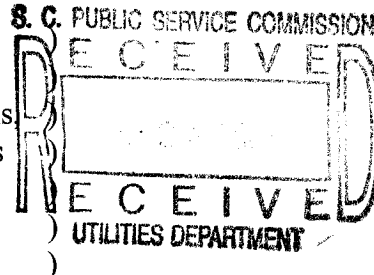
BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA



DOCKET NO. 2001-209-C

IN RE:

Application of BellSouth Telecommunications
Inc to Provide In-Region InterLATA Services
Pursuant to Section 271 of the
Telecommunications Act of 1996



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FILED

**COMMENTS OF US LEC OF SOUTH CAROLINA INC. AND
SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION
OPPOSING BELL SOUTH TELECOMMUNICATIONS,
INC.'S REQUEST TO WITHDRAW SGAT**

US LEC of South Carolina Inc. ("US LEC") and Southeastern Competitive Carriers Association ("SECCA")¹ (collectively, the "Joint Commenters"), by and through its undersigned counsel and pursuant to the Commission's Notice of Filing issued in the above-styled proceeding, takes the opportunity to provide their comments concerning the letter from BellSouth Telecommunications, Inc. ("BellSouth") dated July 20, 2004 to the Commission purporting to withdraw its SGAT ("Withdrawal Request"). The Joint Commenters' position is that BellSouth may not unilaterally withdraw the SGAT without Commission approval, that the Commission should deny the Withdrawal Request, and that a generic proceeding should be initiated to consider what, if any, revisions to the SGAT are necessary taking into account the recent *Interim UNE Order* issued by the Federal Communications Commission ("FCC").² In support of their position, the Joint Commenters state the following:

¹ SECCA members include TWTC, US LEC, XO North Carolina, Inc., and ICG Telecom Group, Inc.

² Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of the Section 251 Unbundling Obligations of the Incumbent Local Exchange*

1. BellSouth claims in its Withdrawal Request that the SGAT is “no longer compliant with federal law” by virtue of the mandate issued by the United States Court of Appeals for the District of Columbia Circuit effectuating its opinion released on March 2, 2004 (“*USTA II*”). Accordingly, BellSouth seeks to unilaterally withdraw the SGAT.

2. Generally, an agreement that does “not comply” with the law means that it is a violation of the law. Neither *USTA II* nor the FCC’s rules or regulations prohibit BellSouth or any other incumbent local exchange carrier from providing access to any network elements on an unbundled basis at TELRIC-pricing to requesting carriers. Section 252(a) of the Act³ is clear that an ILEC may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of Section 251 of the Act.⁴ This provision of the Act has not been found to be unconstitutional nor has any FCC rule restricted the application of this provision of the Act. Moreover, the FCC clearly held, and *USTA II* did not vacate the FCC’s decision, that BellSouth and the other Bell Operating Companies must continue to comply with, and provide those network elements set forth in, Section 271 of the Act, checklist items 4 – 10.⁵ Consequently, the terms of the SGAT do not violate either the Act or the FCC rules and regulations and do not support BellSouth’s assertions that the SGAT is not “compliant with the law.”

Carriers, CC Docket No. 01-338, FCC 04-179 (July 21, 2004) (“*Interim UNE Order*”) (See fn. 5, “Throughout this Notice and Order, references to an incumbent LEC’s obligations under its interconnection agreements apply also to obligations set forth in the incumbent LEC’s applicable statements of generally available terms (SGATs) and relevant state tariffs.”)

³ 47 U.S.C. § 252(a). “Act” is the Communications Act of 1934, as amended by the Telecommunications Act of 1996.

⁴ 47 U.S.C. §§ 251(b) and (c).

⁵ 47 U.S.C. § 271(c)(2)(C)(iv) – (x).

3. Further, BellSouth was not relieved of all of its Section 251(c) obligations by either the FCC's *Triennial Review Order*⁶ or *USTA II*. The *Triennial Review Order* relieved BellSouth of providing access to certain unbundled network elements pursuant to Section 251 of the Act and the obligation to provide other unbundled network elements pursuant to the FCC's rules adopted under Section 251 of the Act that were vacated (at least temporarily) by *USTA II*. Therefore, a complete withdrawal of the SGAT is not warranted, and the Commission should determine whether certain network elements should continue to be provided pursuant to its authority under Sections 252 and 253 of the Act.⁷

4. BellSouth has averred to other state commissions that it "would honor its existing Interconnection Agreement[s] until such time as established legal processes relieve BellSouth of that obligation."⁸ BellSouth suggested that such processes could occur through "change of law" provisions in the Interconnection Agreements themselves, by a generic proceeding held by the appropriate state agencies, or by a proceeding filed in the appropriate court." BellSouth states "clearly and without exception, that it will not act unilaterally to modify or change the existing agreements."⁹ The Joint Commenters, therefore, urge the Commission to initiate a generic proceeding to address the continuing obligations of BellSouth to provide access to UNEs in the aftermath of *USTA II*, the *Triennial Review Order*, and the *Interim UNE Order*.

⁶ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

⁷ 47 U.S.C. §§ 252 and 253.

⁸ BellSouth Telecommunications, Inc.'s Response in Opposition to the Petition of CompSouth for Declaratory Ruling, *In the Matter of Request of the Competitive Carriers of the South, Inc. for an Emergency Declaratory Ruling*, Docket No. P-100, Sub 133t, p.3 (June 4, 2004).

⁹ *Id.*, p.4.

5. In the *Interim UNE Order*, the FCC has placed a “freeze” on the contractual obligations of the ILECs and has required the ILECs to continue to provide access to unbundled network elements (“UNEs”) that were vacated (or arguably vacated) by *USTA II* under the same rates, terms and conditions that applied under interconnection agreements as of June 15, 2004.¹⁰ The FCC applies this “freeze” to ILEC obligations contained in SGATS¹¹ as of June 15, 2004.¹² This “freeze” remains in effect until the earlier of (1) a six month period from the date the Order is published in the Federal Register or (2) the effective date of the final unbundling rules promulgated by the FCC, unless such obligations are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations, or (3) (with respect to rates only) a state public utility commission order raising the rates for UNES.¹³ The FCC also stated that “these obligations apply irrespective of whether an incumbent LEC has taken steps before or after this date to relieve itself of such obligations.”¹⁴ Further, the FCC did not preclude the ILECs from initiating change of law proceedings as long as “they reflect the transition regime set forth [in Paragraph 29 of the Order] and provided that incumbents continue to comply with [the FCC’s] interim approach.”¹⁵

6. Although the *Interim UNE Order* has not yet been published in the *Federal Register* and is not effective, it is very clear that BellSouth’s attempt to

¹⁰ *Interim UNE Order*, ¶¶ 16, 21.

¹¹ *Id.*, fn. 5 (“Throughout this Notice and Order, references to an incumbent LEC’s obligations under its interconnection agreements apply also to obligations set forth in the incumbent LEC’s applicable statements of generally available terms (SGATs) and relevant state tariffs.”)

¹² The FCC did not make a distinction between agreements that were in effect on June 15, 2004, and agreements that were expired as of June 15, 2004, but still applied as June 15, 2004. *Interim UNE Order*, fn. 57.

¹³ *Id.*

¹⁴ *Id.*, fn. 6.

¹⁵ *Id.* ¶ 23.

unilaterally withdraw the SGAT does not affect the continued viability and availability of the rates, terms and conditions of the South Carolina SGAT for the interim and transition period established by the FCC. The FCC contemplates that there will be orderly transition from the current UNE obligations of the ILECs to possible future reduced obligations of the ILECs. Thus, the FCC provides the ILECs the opportunity to negotiate change of law amendments to existing agreements with a presumption that the ILECs may not be obligated under Section 251(c)(3) and the FCC's rules to provide certain UNEs. Nevertheless, the FCC has foreclosed the ILECs from making a "flashcut" of providing access to such UNEs until such time as the FCC has made its determination and requires that any revision or modifications to existing agreements, including SGATS, incorporate the interim and transition regime set forth in Paragraph 29. Furthermore, even though the Withdrawal Request was submitted prior to the adoption, release and effective date of the *Interim UNE Order*, the FCC has specifically stated these actions are ineffectual and the ILECs remain obligated to provide unbundled local switching, enterprise market loops (DS1 and above), and dedicated transport as required under the *Interim UNE Order*.

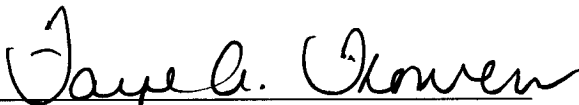
7. Additionally, BellSouth's unilateral withdrawal of its SGAT calls into question whether it continues to comply with the obligations and requirements of Section 271 of the Act. An investigation should be conducted to ensure that BellSouth's actions do not result in a return to a market where BellSouth monopolizes both the local exchange and long distance market such as "Ma Bell" did prior to the Judge Green's Modified Final Judgment. BellSouth should not be permitted to obtain the benefit of the Telecommunications Act of 1996 (*i.e.*, long distance authority) without continuing to

meet the conditions and obligations imposed on it to receive such benefit. The Commission must consider whether BellSouth can continue to meet its obligation under Section 271 of the Act in light of *USTA II*, the FCC *Triennial Review Order*, and the *Interim UNE Order* prior to approving either the withdrawal of the SGAT or any subsequent modifications to it.

8. Accordingly, the Commission should deny the purported withdrawal of the SGAT by Bellsouth, and initiate a generic proceeding to determine what revisions or modifications may be made to the SGAT in light of *USTA II*, the requirements of Section 271 of the Act, the FCC's *Triennial Review Order* and the *Interim UNE Order*, and the need to retain an open competitive local exchange market in South Carolina.

Respectfully submitted,

**US LEC OF SOUTH CAROLINA INC.
SOUTHEASTERN COMPETITIVE CARRIERS
ASSOCIATION**

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Columbia, South Carolina

Date: September 7, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 7, 2004, s/he caused the foregoing **Comments of US LEC of South Carolina Inc. and the Southeastern Competitive Carrier Association Opposing BellSouth Telecommunication, Inc.'s Request to Withdraw SGAT** to be served on all parties of record addressed as follows:

<i>Via Hand Delivery</i> Patrick W. Turner, Esquire BellSouth Telecommunications, Inc. 600 Williams Street, Suite 5200 Columbia, SC 29201	<i>Via email dwcothran@wchlawn.com</i> Darra W Cothran , Esquire Woodward Cothran & Herndon Post Office Box 12399 Columbia, SC, 29211
<i>Via email glsharp@comcast.net</i> Garry L. Sharp , Esquire AT&T COMMUNICATIONS 1908 Tyne Blvd. Nashville, TN, 37215	<i>Via email jpringle@ellislawhorne.com</i> John J. Pringle, Jr., Esquire Ellis Lawhorne & Sims, PA PO Box 2285 Columbia, SC 29202
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